HANHYO SDN. BHD.

v.

MARPLAN SDN. BHD & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-56 OF 1988]
21 JUNE 1991

CIVIL PROCEDURE: *Notice of discontinuance - Validity - Time period of filing and serving on defence - Effect of rights of defendant - Injustice - Collateral advantage - Not bona fide - Dominis litis - Deprivation of an advantage - Rules of the High Court 1980, O. 19 r. 2, O. 21 rr. 2, 3.*

On 7 July 1987, the plaintiff H, a specialist sub-contractor, instituted a suit (the first suit) against the first defendant D1, who was the nominated sub-contractor of the second defendant contractor, D2, for the construction of the Selangor State Mosque at Shah Alam. H had completed all works and the third defendant D3, which was the architect, had issued some progress payment certificates to D2. H claimed the money due to them under the certificates. H also obtained an interim injunction against D2, restraining it from paying all monies due and payable to D1.

D1's application to set aside the injunction and for a stay of the proceedings under s. 6 of the Arbitration Act 1952 (the Act) was dismissed by the trial Judge. The Supreme Court allowed D1's appeal, holding that the High Court did not have power to grant an injunction to restrain D2 from paying out the monies as D2 was not a party to the action.

H then instituted the present suit against D1, D2 and D3 claiming:

(a) against D1, payment for works done under the specialist sub-contract;

(b) against D2, an order directing it to pay H directly all the sums certified by D3; and

(c) as against D3, an order directing it to value and certify all amounts due from D1 to H under progress payment certificates No. 40 to 44.

H also obtained an *ex parte* injunction in relation to that the funds in the banks of D2 which was due to D1 be preserved in D2's custody.

H also filed a discontinuance of the first suit on 14 March 1988 but this was only served on D1's solicitors on 31 March 1988. On 4 April 1988, D1's solicitors applied to set aside or strike out H's notice of discontinuance of the first suit on the grounds that it was irregular and/or an abuse of the process of Court as the present suit was instituted prior to the service of notice of discontinuance of the first suit on them. The trial Judge dismissed D1's application. D1's appeal to the Supreme Court was disallowed.

In the meantime, H obtained judgment against D2 and D3. H then filed a notice of discontinuance against D1 on 23 June 1990 on the basis that as the final judgment against D2 rendered H's claim against D1 unnecessary, H was obliged to discontinue the present suit against D1 under O. 21 r. 2(1) of the Rules of the High Court 1980 (RHC) 1980. H's application to set aside the injunction obtained by it was allowed on 12 October 1990. H argued therefore that D1's application to set aside the writ and statement of claim of this action and to revoke the injunction when D1 was no longer a party was wholly misconceived.

D1 contended that discontinuance would deprive D1 of the right which had already accrued to it in its summons to set aside the injunction obtained by H on 4 March 1988; allowing H to discontinue its action would be tantamount to letting H have the benefit of an order which it could not sustain on the merits.

Held:

[1] The Court would not compel a plaintiff to discontinue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant:

(a) if it was made with ulterior motive to obtain a collateral advantage, or

(b) if the discontinuance was not made *bona fide* by the plaintiff but was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence or

(c) if by the discontinuance of the action, the plaintiff would be deprived of an advantage which he has already gained in the litigation.

[2] On the facts of this case, it is clear that H filed its notice of discontinuance with the ulterior motive of gaining a collateral advantage. Having obtained judgment against D2, H is entitled to require D2 to pay all monies lawfully due to it. There is no reason for H to continue the action against D1 against whom H was also claiming monies due under the sub-contract.

[3] As there was an agreement between H and D1 to refer the dispute to arbitration, by asking an order for stay of the proceedings, all that D1 was doing was asking for an opportunity to have the disputes referred to arbitration. Therefore, the discontinuance of this action against it would not deprive it of the opportunity as D1 can still require H to refer the disputes to an arbitrator; if H refuses, D1 can seek a Court order directing H to refer the matter to arbitration.

[4] As there is no injunction in existence, and as the Senior Assistant Registrar had directed D2 to pay the sums certified by D3 to H, the question of whether the injunction was rightly or wrongly granted is purely academic.

[5] Although the notice of discontinuance was *prima facie* valid, under O. 19 r. 2 and O. 21 rr. 2 & 3 of the RHC, H should have given notice without leave of Court to discontinue the action against D1 at the latest between the 1st week or 2nd week of May 1988 and H should not have waited until 22 June 1990 to file the notice of discontinuance. H never obtained leave of this Court for the late filing and therefore the said notice is bad and should be rejected.

[6] In this case, the proper order that the Court should make is that leave to discontinue the action against D1 is granted to H subject to H not instituting fresh action against D1, that D1's right to institute action under the Arbitration Act is not prejudiced by H, and that costs of the proceedings relating to the service of the invalid notice of discontinuance and leave allowing H to discontinue the action against D1 be paid by H to D1.

[Order accordingly.]

Cases referred to:

Castanho v. Brown & Root (UK) Ltd. [1980] 3 All ER 72; [1981] AC 557 ***(foll)***
Covell Matthews & Partners v. French Wools Ltd. [1977] 2 All ER 591 ***(foll)***
Fox v. Star Newspaper Co. [1898] 1 QB 636 ***(foll)***

Goldsmith v. Sperring Ltd.[1979] 2 All ER 566 ***(cit)***
Khoo Chin In & Anor. v. Reliance Enterprise Sdn. Bhd. & Ors. [1976] 1 MLJ 35 ***(cit)***
Overseas Union Finance Ltd. v. Lim Joo Chong [1971] 2 MLJ 124 ***(foll)***
Robertson v. Purdey [1906] LR 2 Ch 615 ***(cit)***

Legislation referred to:
Arbitration Act 1952, s. 6
Landlord and Tenant Act 1954 [UK], ss. 24, 29(2), 245A
Moneylenders Ordinance 1951, s. 16
National Land Code 1965, Form 16D
Rules of the High Court 1980, O. 12 r. 5, O. 18 r. 19, O. 21 r. 2(1)
Rules of the Supreme Court 1957, O. 21 r. 2(1), O. 26 r. 1, O. 29 r. 9

Other source referred to:
English Supreme Court Practice 1985 Edn., at p. 359

For the plaintiff -Pathmanathan; M/s. Yusof Lee Pathma & Marbeck
For the 1st defendant - Sri Ram; M/s. Sri Ram & Co.

JUDGMENT

Lim Beng Choon J:

The sole question posed to this Court is whether the plaintiff was entitled to discontinue this action commenced by it against the 1st defendant thereby depriving the 1st defendant the rights allegedly already accrued to it in its summons to set aside the injunction obtained by the plaintiff on 4 March 1988.

In order to understand the issues which give rise to the aforesaid question it is necessary to refer briefly to the history of the proceedings leading to the application of the 1st defendant to set aside the said injunction.

On 7 July 1987 the plaintiff instituted an earlier suit dated 7 July 1987 (the first suit) naming Marplan Sdn. Bhd. as the sole defendant. The plaintiff was a specialist subcontractor appointed by the defendant who in turn was the nominated subcontractor of the Selangor State Mosque at Shah Alam. The plaintiff had completed all works and the Architect Jurubena Bertiga International had issued some progress payment certificates to Bina Goodyear Sdn. Bhd. and the plaintiff therefore claimed the money due to them under the certificates. Simultaneously with the filing of the first suit, the plaintiff also applied and obtained an interim injunction by which Bina Goodyear Sdn. Bhd. was restrained from paying all monies that were due or became due and payable to Marplan Sdn. Bhd. up to the sum of RM2,754,895.50. The injunction order appears in the appeal record of the Supreme Court of Malaysia (Appellate Jurisdiction) Civil Appeal No. 502 of 1988 (hereinafter referred to as the appeal record) at p. 16. On 15 July 1987 Marplan Sdn. Bhd. applied by way of summons-in-chambers to set aside the injunction of 7 July 1987 and also to stay the proceedings pursuant to s. 6 of the Arbitration Act 1952. The prayers to set aside the injunction was dismissed by the trial Judge and Marplan Sdn. Bhd. appealed to the Supreme Court against the decision of the trial Judge. When the appeal came on for hearing before the Supreme Court on 11 March 1988 the Supreme Court allowed the appeal on the ground that the High Court had no power to grant an injunction to restrain Bina Goodyear Sdn. Bhd. from paying out the monies when it was not a party to the action. Thereafter on 14 March 1988 the plaintiff filed a notice of discontinuance of the first suit and at the same time commenced this suit naming Marplan Sdn. Bhd. as the 1st defendant, Bina Goodyear Sdn. Bhd., the 2nd defendant and

Jurubena Bertiga International as the 3rd defendant. The reliefs sought as against the 1st defendant was payment of RM2,754,595.50 for works done under the specialist subcontract and as against the 2nd defendant an order directing it to pay the plaintiff directly all sums certified by the 3rd defendant and finally as against the 3rd defendant an order directing them to value and certify all amounts due from the 1st defendant to the plaintiff under progress payment certificates Nos. 40 to 44. Again on the same day the plaintiff applied by way of *ex parte* summons-in-chambers for an injunction directing that the funds in the banks of the 2nd defendant and due to the 1st defendant for works executed in respect of the State Mosque Shah Alam up to the sum of RM2,754,595.50 be preserved in the 2nd defendant's custody pending further order of this Court (see encl. 3 of the Court file). This Court granted the injunction prayed for subject to the usual undertaking to abide by any order the Court should make as to damages (see encl. 5). It is not disputed that the notice of discontinuance dated 14 March 1988 was served on the solicitors for the 1st defendant only on 31 March 1988. It was also on the same date that solicitors for the 1st defendant were informed of the institution of this suit. On 4 April 1988 the 1st defendant through its solicitors wrote a letter to the solicitors of the plaintiff objecting to the discontinuance of the first suit and the commencement of this suit prior to the service of the notice of discontinuance on them (see p. 51 of the appeal record). The 1st defendant thereupon filed an application by way of summons-in-chambers on 15 April 1988, to set aside and/or to strike out the plaintiff's notice of discontinuance on the grounds that the same was irregular and/or an abuse of the process of Court (see p. 22 of the appeal record). The trial Judge dismissed the application of the 1st defendant to set aside and/or strike out the plaintiff's notice of discontinuance on 10 November 1988 (see p. 24 of the appeal record). The 1st defendant then brought the matter on appeal to the Supreme Court on 21 November 1988. The Supreme Court disallowed the appeal and upheld the decision of the trial Judge.

Earlier on 15 April 1988, the 1st defendant had entered a conditional appearance followed by an application by way of summons-in-chambers dated 20 April 1988, for an order that:

(a) the indorsement of the writ of summons and the statement of claim be struck out under the Rules of the High Court 1980, O. 18 r. 19 and/or under the inherent jurisdiction of the Court; on the ground that the same is frivolous or vexatious or an abuse of the process of this Honourable Court;

(b) further or alternatively, that the injunction therein granted *ex parte* by the order of the Honourable Mr. Justice Dato' Ajaib Singh on 14 March 1988, be discharged, dissolved or set aside;

(c)(i) further or alternatively, that this action and all further proceedings hereinafter be stayed pursuant to O. 12 r. 5 of the Rules of High Court 1980 until the costs payable by the plaintiff to the 1st defendant as ordered by the Supreme Court of Malaysia on the 11th day of March 1988 in Supreme Court Civil Appeal 466 of 1987 shall have been paid by the plaintiff to the 1st defendant;

(ii) that if such be not paid within 14 days of service of the Taxing Officer's Certificate(s) this action be dismissed with cost including costs of this application.

(d) Further or alternatively, that this action and all further proceedings hereinafter be stayed pursuant to s. 6 of the Arbitration Act 1952 on the grounds that the plaintiff and the 1st defendant having by an agreement in writing dated 27 March 1986, agreed to refer to arbitration the matter in respect of which this action is commenced;

(e) costs of and occasioned by this application be provided for;

(f) that such further orders or directions be made or given as this Honourable Court deems just in the circumstances.

In the meantime the plaintiff was granted a certificate of non-appearance on 25 March 1989 against the 2nd defendant Bina Goodyear Sdn. Bhd. who had been duly served with the writ and statement of claim in this action. Likewise a certificate of non-appearance had also been granted to the plaintiff against the 3rd defendant, Jurubena Bertiga International also on 25 March 1989. In addition on 25 March 1989 the plaintiff applied by way of a summons-in-chambers (see encl. 22) for an order that the plaintiffs be given leave to enter judgment against the 2nd and 3rd defendants. The said summons were duly served on the 2nd and 3rd defendants. The plaintiff's application was heard by the Senior Assistant Registrar of this Court on 31 March 1989 who made the following order (see encl. 30):

> **It is hereby ordered** that the plaintiffs be given leave to enter judgment against the 2nd defendants **and it is further ordered** that the 2nd defendants do pay the plaintiffs directly all sums certified by the 3rd defendants as due to the plaintiffs within 2 days from the date of service of this order **and it is lastly ordered** that the 2nd defendants do pay the plaintiffs RM350 costs.

Finally a notice of discontinuance against the 1st defendant dated 22 June 1990 was filed by the plaintiff on 23 June 1990 and was sent by fax apparently to the 1st defendant's solicitors on the date of filing of the same.

The contentions of Counsel for the plaintiff as stated in his submission may be briefly summarised as follows. As the final judgment against the 2nd defendant rendered the plaintiff's claim against the 1st defendant unnecessary, the plaintiff was obliged to discontinue the present suit against the 1st defendant and accordingly did so on 22 June 1990. The said discontinuance was made under O. 21 r. 2(1) as the 1st defendant did not file any statement of defence. The plaintiff had also applied to set aside the injunction obtained by it on 14 March 1988 and its application was allowed by this Court on 12 October 1990 (encl. 44). Hence the 1st defendant's application and insistence to proceed with its application to set aside the writ and statement of claim of this action and to revoke the injunction when the 1st defendant was no longer a party to this action is wholly misconceived.

Counsel for the defendant, on the other hand, submitted that the 1st defendant could not file a formal statement of defence because had it done so the arbitration point would have been lost to the 1st defendant as it would have amounted to a step in the action. Discontinuance could be granted if no injustice was occasioned to the defendant and Counsel cited three authorities to support this proposition. Counsel argued that in the present case the injunction of 14 March 1985, though directed at the 2nd defendant, in substance, affected the 1st defendant's rights. Discontinuance would deprive the 1st defendant of the right already accrued to it in its summons to set aside the injunction. He then went on to contend that the 1st defendant was in *dominus litis* because of its ability to demonstrate a strong *prima facie* case warranting the dissolution of the injunction. If the plaintiff was permitted to discontinue the action against the 1st defendant, it would be tantamount to letting the plaintiff have the benefit of an order which it could not on the merits sustain. It had used the process of the Court to obtain an advantage which it was not entitled to in the first place and then wanted to hold on to that advantage by means of another process of the Court namely, the provision of discontinuance. He therefore asked the Court to decline to act on the notice to discontinuance and proceed to hear the 1st defendant's summons to dissolve the injunction.

In considering whether the points raised by Counsel for the plaintiff are right and the points raised by Counsel for the 1st defendant are wrong or *vice versa*, one important point which in my deliberation of the case I had taken into consideration was that the 1st defendant has not contended that in discontinuing the action against the 1st defendant the plaintiff has failed to comply with the provisions of O. 21 r. 2(1) of the RHC except that its Counsel in his submission said that the notice of discontinuance should not be filed on 22 June 1990 before the said notice had been served on the 1st defendant on 23 June 1990. Counsel for the 1st defendant was wrong because although the Notice of Discontinuance was dated 22 June 1990 it was not filed until 23 June 1990 which was the same date as the service of the notice on the 1st defendant (see encl. 37A). Even assuming that the plaintiff had filed the notice on 22 June 1990 (which it did not do so) the most that could be said would be that the discontinuance would not take effect until the service of the notice on the 1st defendant on 23 June 1990. However that may be the submission of Counsel for the 1st defendant was focused on the legal principle that although the plaintiff had the unqualified right under O. 21 r. 2(1) of RHC to discontinue its action against the 1st defendant without leave of the Court before the service of the defence on the plaintiff yet if the plaintiffs abused such right by serving a notice of discontinuance which would cause injustice to the defendant and/or was nothing more than an abuse of the process of Court, the Court then had the power to set aside the notice of discontinuance. The grounds relied upon by Counsel to support his contention have been set out by me and I need not repeat them. Counsel had cited the following cases:

(i) Fox v. Star Newspaper Co. [1898] 1 QB 636.
(ii) Goldsmith v. Sperring Ltd.[1979] 2 All ER 566.
(iii) Castanho v. Brown & Root (UK) Ltd. [1980] 3 All ER 72.
(iv) Castanho v. Brown & Root (UK) Ltd. (HL(E)) [1981] AC 557.
(v) Overseas Union Finance Ltd. v. Lim Joo Chong [1971] 2 MLJ 124.
(vi) Khoo Chin Inn & Anor. v. Reliance Enterprise Sdn. Bhd. & Ors. [1976] 1 MLJ 35.
(vii) Robertson v. Purdey [1906] LR 2 Ch 615.
(viii) Covell Matthews & Partners v. French Wools Ltd. [1977] 2 All ER 591.

Of the eight cases cited it is my considered opinion that only three cases are worthy of consideration namely cases (iv), (v) and (viii) in respect of the contention raised by the Counsel for the defendants. I shall therefore first deal with the remaining cases which are not relevant. In the *Fox* case the plaintiff applied to be non-suited under the old English procedure rules of 1875 which had been repealed by Rules of 1883 and it was held by AL Smith LJ that as the old rules governing non-suiting had been revoked by the new rules of 1833 which provided that after a certain stage, the plaintiff could not without leave of the Court discontinue the action. Furthermore the pleadings in that case were closed and was ready for trial after the swearing in of the jury. Hence Chitty LJ in the same appeal said at p. 638 of the reported case:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the Judge to say whether the action shall be discontinued or not and upon what terms.

In the case (ii) of *Goldsmith & Sperring* it merely laid down the general principle that in as much as it could be an abuse of the Court in premature termination of an action, this principle applies equally well to the institution of an action which is tantamount to an abuse of the process of the Court.

The points of law raised in case (iii) and the principles laid down therein have been subsequently dealt with when that case was moved on appeal to the House of Lords - see case (iv).

As to case (vi) it dealt with O. 26 r. 1 of the old Rules of Supreme Court 1957, and the learned trial Judge held that as the plaintiff had taken all the necessary steps pursuant to the said rule he had the right to discontinue the action instituted by him.

Case (vii) is concerned with whether upon an application for leave to discontinue an action the Court would allow leave upon the terms that the plaintiff should not bring any other action on the same matter against the defendant and he should pay the defendants costs.

I shall now turn to the three cases (iv), (v) and (viii) cited by Counsel for the 1st defendant which I have earlier said are relevant in assisting me to decide on the issue raised in the present case. To be able to understand the principles and rulings of the House of Lords in *Castanho v. Brown & Root* (UK) Ltd. & Anor. [1981] AC 557 a brief narration of the facts as set out in the headnote is necessary. The plaintiff, a Portuguese subject, resident in Portugal was severely injured by an accident in February 1977 while he was employed by the 2nd defendants, a Panamanian company, on an American ship lying in an English port. The 1st defendants, an English company, provided shore services for the ship. Both defendants were associates of a larger Texas based group of companies. While the plaintiff was in hospital in England a writ was issued in September 1977 by English solicitors claiming damages for his injuries. On 22 March 1978 at the invitation of the defendants' solicitors a consent order was made under the RSC O. 29 r. 9 for an interim payment of £7,250 to the plaintiff and a further order for an interim payment of £20,000 was made on 8 December 1978. During 1978 a firm of Texan attorneys contacted the plaintiff in order to persuade him to bring proceedings in Texas where higher damages could be obtained. On 8 February 1979, the plaintiff executed a power of attorney giving the Texan firm exclusive powers to prosecute his claim in the United States and providing for them to be paid 1/3 of the sum recovered in an out of Court settlement and 40% if the petition were filed and further providing that the English action was not to be concluded prior to the decision of the United States case. On 30 April 1979 after proceedings on the plaintiff's behalf had been commenced in a Texas state Court, the defendants delivered a defence in the English action in which liability was admitted by the 2nd defendants. On 14 May 1979 the plaintiff's English solicitors served a notice of discontinuance on the defendants under RSC O. 21 r. 2(i). In July 1979 a fresh action claiming compensatory and punitive damages was started on the plaintiff's behalf in a United States Federal Court in Texas and the proceedings in the State Court were ended by filing a non-suit. At the hearing of the summons for direction of the defendants it was directed that it be treated as an application to strike out the notice of discontinuance and the application was fixed for hearing before Parker J who after hearing submissions of Counsel struck out the notice of discontinuance and granted an injunction restraining the plaintiff from commencing or continuing proceedings in the United States in respect of a claim for damages for the personal injuries he had sustained in the accident. On appeal by the plaintiff, who had issued a fresh writ in England to protect his position in case the Court in Texas declined jurisdiction, the Court of Appeal by a majority (Lord Denning dissenting) set aside the order of the trial Judge striking out the notice of discontinuance and discharged the injunction. In dissenting Lord Denning said at p. 80 of *Castanho v. Brown & Root* [1980] 3 All ER 72 CA:

> Another way of reaching the same result is to hold as Parker J did, that once interim payments have been sought and received and spent, it is abuse of the process of the Court to discontinue the proceedings without the leave of Court ... If it (a legal process) is used for the purpose

> of the party obtaining some collateral advantage for himself and not for the purpose for which such proceedings are properly designed and exist, he will be held guilty of abuse of the process of Court. So here the notice of discontinuance was done without leave, so as to aid the American lawyers in obtaining 40% for themselves out of the American litigation. That was an abuse of the process of the English Court. If I am right in thinking that leave is necessary, then the Court can do what is right and just. It can insist on repayment at once in cash, as a condition of giving leave to discontinue; or alternatively it can allow the plaintiff to retain the interim payments (and not repay them) on condition that no other action shall be brought for the same cause ... or it can refuse leave and insist on the case going to judgment.

The defendants appealed to the House of Lords against the majority ruling of the Court of Appeal. In dismissing the appeal Lord Scarman agreed with the propositions of Lord Denning. I shall cite only the statements of Lord Scarman which are relevant and they are those which appear at p. 571 of the reported case:

> It is accepted that under the Rules of Supreme Court as they were in 1979 ... the plaintiff, notwithstanding the two interim payments and the admission of liability, could discontinue without leave, if he did so not later than 14 days after service of the defence ... Unless therefore, it is possible to treat a notice of discontinuance without leave which complies with the Rules of the Supreme Court as an abuse of process (which Parker J did) the notice **cannot** be struck out.

> In the Court of Appeal Lord Denning MR was prepared so to hold. Brandon LJ expressed no opinion. Sham LJ however, held that it was not possible. It seemed to him "an inversion of logic to speak of an act which purports to terminate a process as being an abuse of that process. I am not insensitive to the logical difficulty. Even if it be logical (and I do not think it is) to treat the termination of legal process as an act which can be an abuse of that process, the principle requires the illogicality be overridden, if justice requires. The Court has inherent power to prevent a party from obtaining by use of its process a collateral advantage which it would be unjust for him to retain and termination of process can, like any other step in the process be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a discontinuance without leave, **though it complies with the rule can be abuse of the process of the Court.** (Emphasis is mine).

It is to be noted that in this case the Texan lawyers in order to urge the plaintiff to commence proceedings in the United States had given an undertaking to the plaintiff to pay him his full monthly wages should his employers decided to dismiss or require him to refund all the interim payments to his employers and to pay all the legal costs and fees incurred by his English solicitors and to pay any other expenses incurred by him. The Texan lawyers gave the undertaking in the power attorney of the plaintiff authorising them to act for him because they were almost sure that should the plaintiff commenced proceedings in the United States he would win the case and would be awarded damages which would be within the region of RM5 million out of which the Texan lawyers would get a contingency fee of 40% of the amount awarded. On account of such arrangement Lord Denning therefore stated that such an arrangement "to English eyes was champertous in the extreme". It was this champertous arrangement which caused Lord Denning to hold that the taking out of the notice of discontinuance was to aid the American lawyers in getting their contingency fee. That was, together with collateral advantage gained by the plaintiff in receipt of interim, an abuse of the process of Court. It is also important to take note that although Lord Scarman did not condemn the champertous arrangement made by the Texan lawyers nevertheless His Lordship in holding that there had been an abuse of Court said at p. 572 of the reported case:

> Was it, then, in the circumstances of this case, an abuse? In my judgment, it was. A sensible test is that which both the Judge and Lord Denning MR applied. Suppose leave had been required (as it would have been, if the notice had been served 24 hours later), would the

> Court have granted unconditional leave? It is in conceivable that the Court would have allowed a plaintiff, who had secured interim payments and an admission of liability by proceeding in the English Court, to discontinue his action in order to improve his chances in a foreign suit without being put upon terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England.

In case (v) of *Overseas Union Finance Ltd. v. Lim Joo Chong* [1971] 2 MLJ 124 the plaintiff, a licensed moneylender, pursuant to a memorandum of agreement granted a loan to the defendant who charged his land as security for the repayment of the loan and a memorandum of charge was also executed by both parties. The defendant failed to repay the loan and after serving the statutory notice of default under Form 16D of the National Land Code without getting any response from the defendant, the plaintiff applied for an order for sale of the charged land. In his affidavit the defendant opposed the application for an order for sale on three grounds. For purpose of this judgment I need mention only the first of the three grounds and that is this: (1) "That the contract was unenforceable as the memorandum of agreement did not comply with s. 16 of the Moneylenders Ordinance 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out." The plaintiff thereafter applied for leave to discontinue the action on the ground that even if the Court were to grant order for sale they, the plaintiff, would find difficulty in selling the property it being a residence and in an area where the value had fallen and his application was opposed by the defendant. Raja Azlan Shah J (as he then was) found that the plaintiff had no answer to the first ground raised by the defendant. His Lordship in dismissing the application for a discontinuation of the action said at p. 126:

> If the applicant here is *dominis litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominis litis*. He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations namely the wrong dates in the memorandum etc. **and the fact that the reason for wanting a discontinuance is not a very strong one**. The respondent/chargor is not to be deprived of these advantages which have made him a well-matched adversary in the arena. (Emphasis is mine).

Again it is to be noted that in this case the plaintiff should not have commenced the action for an order of sale when the memorandum of agreement for the loan was void in law. Having done so and then faced with an impregnable defence, the defendant should not be deprived of obtaining from the Court a ruling that not only should the application for an order of sale should be dismissed but also that the consequential ruling that the charge of the land was null and void. The plaintiff should not be allowed to hold on to an illegal charge. It is also to be noted that the ground for discontinuing the action was found by the learned Judge to be a weak one.

The last case cited by Counsel for the 1st defendant (case (viii)) is the case of *Covell Matthews & Partners v. French Wools Ltd.* [1977] 2 All ER 591. This is a tenancy case. The plaintiff was the tenant of certain premises belonging to the defendant. When the tenancy agreement was about to expire the plaintiff gave notice that they would not give up possession of the premises and wanted the defendant as landlords to grant them a new tenancy. Having got no response from the defendant, the plaintiff issued an originating summons seeking an order for the grant by the landlords of a new tenancy of the premises in accordance with ss. 24 and 29(2) of the Landlord & Tenant Act 1954. Negotiations between the parties as to the terms and conditions of a proposed new tenancy took place and the hearing of the originating summons was postponed from time to time. There was a dispute

whether terms for a new lease were finally agreed or not; the landlords said that they were and the tenants said they were not. Some time later the tenants left the premises and thereafter served on the landlords an application for leave to withdraw the originating summons which they asked for a new tenancy. Prior to that the landlords had written a letter to the tenants stating that there was a binding contract to grant a new lease on terms therein set. After the tenants had filed in their application for leave to discontinue the landlords commenced proceedings for specific performance of the alleged contract. In addition to the proceedings commenced by the landlords, they also issued a summons to determine interim rent in accordance with the provisions of s. 245A of the 1954 Act. The learned trial Judge allowed the tenants application for a discontinuation of the action subject to certain conditions which I shall set out presently. In doing so the learned trial Judge said at p. 594:

> The principles to be culled from these cases (cited by Counsel for the defendant) are, in my judgment, that the Court will normally at any rate, allow the plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. **It is not desirable that a plaintiff should be compelled to litigate** against his will ... but in doing so (the Court) should be careful to see that the defendant is not deprived of **some advantage which he has already gained** in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved. (Emphasis is mine).

The conditions set down by the learned trial Judge in allowing the plaintiff to discontinue the action can be found at p. 594 where he said:

> In my judgment, therefore, I think that in principle the master was correct in his grant of leave to the tenants to withdraw their application of 13 March 1973 for a new tenancy and I hold that such leave should be given. At the same time, for the landlords' protection, the order being for leave to discontinue and not for dismissal, the tenants should be put on terms: (1) not to make any fresh application for a new tenancy; this may in fact be academic in view of the time which had elapsed since the first application, but such a term positively safeguards the position; (2) the grant for leave should, as requested by Counsel for the landlords, be expressed to be given without prejudice to the landlords' contention that a binding agreement has been reached between the parties, and without prejudice to the effect of such agreement if it is eventually decided that it is binding; (3) an appropriate order for costs against the tenants should be made.

The principles that can be extracted from the aforementioned cases are that the Court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:

(1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v. Brown & Root Ltd*;

(2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence - see *Overseas Union Finance Ltd. v. Lim Joo Chong* case;

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation - see *Covell Matthews & Partners v. French Wools Ltd.* case.

Transposing the abovementioned principles to the present case, it cannot certainly be said that the plaintiff filing the notice of discontinuance was done with ulterior motive to gain a collateral advantage. On this point it is to be noted that the plaintiff in this action was suing

not only the 1st defendant but also the 2nd defendant, who was the main contractor of the Selangor State Mosque Shah Alam. The relief prayed for by the plaintiff against the 2nd defendant was "an order that the 2nd defendants pay the plaintiffs directly all sums certified by the 3rd defendants as due to the plaintiffs." The 3rd defendant was the consulting architect of the project whose duties were among other things to certify progressive payments. Having got judgment in default of appearance and defence against the 2nd defendant the plaintiff is entitled to require the 2nd defendant to pay all monies lawfully due to the plaintiff. In the circumstance the plaintiff has no reason to continue the action against the 1st defendant against whom he was also claiming for monies due to him under the sub-contract. Secondly in its application made by summons-in-chambers dated 20 April 1988 (encl. 9) the 1st defendant sought for several orders the most relevant of which was an order to stay the proceedings pursuant to s. 6 of the Arbitration Act 1952, on the grounds that the plaintiff and the 1st defendant having by an agreement in writing dated 27 March 1986, agreed to refer to arbitration the matters in respect of which this action was commenced. By asking for such an order it certainly cannot be said that the 1st defendant had obtained an advantage in the litigation of which it would be deprived of if the plaintiff were allowed to discontinue the action against the 1st defendant. All that it was asking was for **an opportunity** to have the disputes arising from its agreement with the plaintiff to be referred to arbitration. That being so the discontinuance of this action against it would not deprive it of the opportunity - the 1st defendant can even now require the plaintiff to refer their disputes to an arbitrator. Should the plaintiff turn down his request for arbitration the 1st defendant can still come to this Court for an order directing the plaintiff to refer the disputes to arbitration. Thirdly in his submission Counsel for the 1st defendant contended strongly that the 1st defendant had a right to ask the Court to revoke the injunction obtained by the plaintiff on 14 March 1988 (encl. 5) as it was entitled to such an injunction since in law an interlocutory injunction cannot be obtained to prevent money being paid out to a third party unless the injunction granted was a Mareva injunction. Counsel has a strong point but unfortunately the injunction had already been vacated by this Court on 12 October 1990, upon the application of the plaintiff on the ground that since final judgment against the 2nd defendant had been granted by this Court on 31 March 1989, the said interlocutory injunction had been rendered nugatory. Furthermore the plaintiff had already obtained an order from the Senior Assistant Registrar (SAR) on 31 March 1989 directing that the 2nd defendant must pay all sums certified by the 3rd defendant as due to the plaintiff within two days from the date of service of the order. As there is no injunction in existence and in view of the aforementioned order made by the SAR the question of whether the injunction was rightly or wrongly granted is purely academic.

For the above reasons, the notice of discontinuance issued by the plaintiff is *prima facie* valid. I say "*prima facie*" because the matter does not end here. Although the point which I am going to discuss was not raised by Counsel for the plaintiff nor Counsel for the 1st defendant, I feel that since it is an important question of law it is incumbent on me to consider that point.

To discuss the point which I mention in the above paragraphs it is necessary to set out in full the provisions of O. 21 r. 2(1) of the RHC:

> 2(1) The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

The crucial words are "or, if there are two or more defendants, of the defence last served." These words clearly show that should there be a plurality of defendants the 14 days would start to run from the date of the defence served by the last defendant on the plaintiff. However if any one of the defendants failed to file his defence on or before the statutory stipulated or mutually agreed date of the filing of defence the plaintiff can give a notice of discontinuance 14 days after the termination of the said date. This is provided in O. 21 r. 2(3) of the RHC which reads:

> 2(3) Where there are two or more defendants to an action not all of whom serve a defence on the plaintiff, and the period fixed by or under these rules for service by any of those defendants of his defence expires after the latest date on which any other defendant serves his defence, para. (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period.

In the English Supreme Court Practice 1985 Edn. at p. 359 it is said:

> In relation to an action begun by writ, under the combined effect of r. 2(2) and 3(3) a plaintiff may serve a notice of discontinuance or withdrawal of any particular claim at any time before the service on him of the defence of the defendant or if there are two or more defendants, of the defence last served, but the last date on which he can effectively serve such a notice is as follows:
>
> (a) where there is only one defendant, not later than 14 days from the service of his defence;
>
> (b) where there are two or more defendants, either not later than 14 days from the service of the defence last served or, if any defendant does not serve a defence, not later than the date fixed for the service of such defendant's defence expires, whichever is the later.

Again in *Mallal's* commentaries of the Rules of High Court 1980 it is likewise stated at p. 261 that:

> If not all the defendants to the claim serve any defence, then the time from which the 14 days period shall run from the expiry of the period for the service of the defence of the party in default.

Now under O. 19 r. 2 of the RHC it is provided that where the writ is endorsed with a statement of claim (and in the present case the writ was so endorsed) and the defendant has entered an appearance (again in the present case the 1st defendant did enter a conditional appearance on 15 April 1988), he must serve his defence within 14 days from the time limited for appearance (which in the present case the 1st defendant had never filed and served its defence at all). The plaintiff should therefore give notice without leave of Court to discontinue the action against the 1st defendant at the latest between the first week or second week of May 1988 and not to wait until 22 June 1990 to file his notice of discontinuance. He must get the leave of this Court to do so which he never did. His notice of discontinuance is therefore bad and should be rejected. Be that as it may this Court can still grant leave to the plaintiff to discontinue the action against the 1st defendant pursuant to O. 21 r. 3(1) of the RHC because had the plaintiff sought leave to discontinue, as he should have done, the logical course for this Court would have given leave to discontinue simply because it is pointless for him to continue the action against the 1st defendant after having entered final judgment in default against the 2nd defendant who pursuant to the judgment in default the 2nd defendant is bound to pay the plaintiff whatever payments duly certified by the 3rd defendant. More importantly as stated above the discontinuance of the action against the 1st defendant can in no way cause injustice to the 1st defendant. However that may be the leave to discontinue the action against the 1st defendant can only be granted subject to certain conditions (see *Castanho v. Brown & Root H.L.* case *(supra)* at p. 577, *Robertson*

v. Purdey (supra) pp. 617-618 and *Covell & Partners v. French Wools Ltd. (supra)* at p. 594). It is my considered opinion that the proper order that this Court should make is that leave to discontinue the action against the 1st defendant is granted to the plaintiff subject to the following conditions:

(1) that the plaintiff should not institute a fresh action against the 1st defendant on the same matter set out in the present suit.

(2) that the grant of leave is given without prejudice to the 1st defendant's right to institute action under the Arbitration Act 1952, to require the plaintiff to refer the disputes (if any) arising out of the agreement entered between the two parties to arbitration.

(3) that the application of the 1st defendant encl. 9 is dismissed without any order as to costs.

(4) that costs of proceedings relating to the service of the invalid notice of discontinuance and the leave allowing him to discontinue the action against the 1st defendant be paid by the plaintiff to the 1st defendant.

Also found at [1991] 3 CLJ 1783